IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

THE BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*, *Appellants*,
v.
ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*, *Appellees*.
} No. 13

On Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division

REPLY TO PETITION FOR REHEARING ON BEHALF OF SOUTHERN GOVERNORS' CONFERENCE ET AL.

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The Southern Governors' Conference and the Southeastern Association of Railroad and Utilities Commissioners urge denial of the petition for rehearing filed by the Northern railroads in this case on the ground that the relief sought herein has no basis in law and is contrary to the public interest.

Although the Northern railroads seek to convey the impression that their petition essentially deals only with an administrative problem of avoiding unnecessary accounting expense, the relief sought in the petition would substantially reverse the decision which this Court has rendered on the merits of this case and would completely deprive these appellees of any of the benefits of this Court's decision for the foreseeable future. Throughout the proceedings in the case, the basic issue has been whether the Northern railroads have proved their right

to an inflated share of the revenues from North-South freight traffic. As representatives of the public interest, we have contended that the record contains no evidence to support such an inflation, and that, in the absence of such evidence, the divisions prescribed by the Interstate Commerce Commission constitute an unjust discrimination against the South.

Both the district court and this Court recognized the soundness of this contention. The district court emphasized the gravity of a divisional structure that would place the South at a disadvantage and pointed out that the Commission has special responsibilities when considering the establishment of such divisions (270 F. Supp. at 711):

> "For many years prior to this case the Commission has consistently followed the view that the primary responsibility for meeting the cost and revenue needs of the railroads of any territory lies with the people and the industry of that territory. New England Divisions, 126 I.C.C. 579, 599 (1927); Divisions of Rates, Official and Southern Territories, 234 I.C.C. 175, 190 (1939); Official-Southern Divisions, 287 I.C.C. 497, 523 (1953); Akron, Canton & Youngstown R. Co. vs. Atchison, T. & S. F. Ry. Co., 321 I.C.C. 17, 51 (1963). In this very case, prior to reopening, the Commission held that the primary division of revenues accruing from this traffic were to be made on an equal-factor scale. We recognize that the Commission is not perpetually bound by their 1953 holding, but we do believe that the Commission has special responsibilities in a case of this magnitude when it departs from its prior finding."

This Court pointed out that an abandonment of uniformity in divisions without evidence to justify the resulting discrimination against the South could put the South in the same disadvantaged position which it occu-

pied prior to the establishment of uniform class rates for traffic moving to, from and within the South (393 U.S. at 91-92):

> "We agree with the District Court that there is no substantial evidence that territorial average costs are necessarily the same as the comparative costs incurred in handling North-South freight traffic. If we were to reverse the District Court, we would in effect be saying that the expertise of the Commission is so great that when it says that average territorial costs fairly represent the costs of North-South traffic, the controversy is at an end, even though the record does not reveal what the nature of that North-South traffic is. . . . If indeed that lax procedure were sanctioned in a North-South divisions case, whose solution turns solely on costs, the class rate discrimination in favor of the North and against the South which we condemned in *New York v. United States*, 331 U.S. 284, could well flourish in another form."

The Northern railroads' petition for rehearing flies directly into the teeth of both of these holdings. On the assumption that nothing more is involved here than the ownership of money as between two groups of railroads, the petition urges that the Northern railroads be permitted to retain the fruits of the discrimination from which the South has suffered for the last four years and that this discrimination be continued indefinitely into the future until the Commission rehears this whole controversy and issues a new order. In view of the holdings of the district court and of this Court, there can no longer be any question that the relief sought by the Northern railroads would have a profound impact upon the South. Retention by the Northern railroads of the revenues collected under the Commission's invalid order would obviously add to the harm already inflicted upon the South by the discriminatory divisional structure which has impeded needed development of rail services in the South

since the Commission's order became effective. An indefinite continuation of that discriminatory divisional structure would leave the South subject to the trade barrier effects of such a structure, even though the harmful and discriminatory nature of that structure has been established by the opinion of this Court. There can be no justification for such a perpetuation and institutionalization of this discrimination against the South.

The fundamental principle that should govern the Court's disposition of the petition for rehearing is the principle that all sections of the country are entitled to equal treatment in the matter of railroad rates and divisions unless and until a firm basis in fact and transportation policy has been established to justify different treatment. This is precisely the principle which this Court applied in *New York v. United States*, 331 U.S. 284 (1947), in upholding the requirement of uniformity in class rates between the North and the South. In that case, the Court rejected attacks upon an interim order of the Commission removing discrimination, even though the Court conceded that conditions may have changed so as to warrant "adjustments in the new permanent uniform scale" that would eventually determine interterritorial class rate relationships (331 U.S. at 350). The Court did not preclude efforts to justify a re-imposition of discriminatory class rates; however, it made it clear that until a justification for discrimination had been established on the basis of substantial evidence embodied in valid findings of the Commission, the principle of uniformity must be observed.[1]

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[1] It is noteworthy that the claims of a justification for discrimination were never pressed in the *Class Rates* litigation and that the uniform class rate scale prescribed in that case is still in effect.

In view of the unchallenged finding of this Court in this case that the Northern railroads have not proved their claim to a higher basis of divisions than the Southern railroads, the same principle requires an immediate re-establishment of uniform divisions and the return of revenues collected under the discriminatory divisional structure that has been in effect for the past four years. The South can never be made completely whole from the harm that has already been inflicted upon it by this discriminatory structure, money that could have been invested to bring about improved rail service in the South has been withheld from the Southern railroads, and the adverse impact of this reduction in railroad investment has already necessarily begun to run through the Southern economy. However, an immediate return of these revenues can repair some of this harm and prevent the infliction of further harm. The Southern railroads' investment program for this year are not yet firmly set, and at least one railroad is awaiting the return of the revenues involved in this case before it finalizes its program (see *Traffic World*, November 16, 1968, p. 20). Plainly, the Southern economy should not be deprived of the benefit of such investments and further subjected to the disadvantage of a discriminatory divisional structure imposed without evidentiary justification.

The decision of this Court in *Morgan v. United States*, 307 U.S. 183 (1939), relied upon as the principal support for the petition for rehearing, does not justify the relief sought by appellants. The *Morgan* case rests upon the principle that a court reviewing administrative action should further, not frustrate, the statutory policy which the administrative agency was created to implement. As the Court put it in *Morgan* (307 U.S. at 191):

> "[I]n construing a statute setting up an administrative agency and providing for judicial review of

> its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action."

Accordingly, the decision in *Morgan* to give retroactive effect to an administrative order requiring reductions in rates was placed squarely upon "the meaning and application of the provisions of the Packers and Stockyards Act" (307 U.S. at 188) which specifically provided for reparations. The present situation is precisely the opposite, since Section 15(6) of the Interstate Commerce Act specifically precludes retroactive adjustment of divisions of voluntarily established joint rates. If this Court were to give retroactive effect to an administrative order prescribing divisions, it would effectively repeal this provision of Section 15(6) and introduce chaos into the whole rate-making procedures for North-South traffic.[2]

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[2] The public interest in facilitating the movement of freight over through routes and on joint rates would be seriously threatened by the creation of equity procedures which circumvent the Congressional policy against retroactive divisions orders. Carriers voluntarily enter into, and maintain, joint rates because they can be sure of the divisions; and because, considering the level of the joint rate and the divisions thereof, the performance of freight service on that joint rate is a profitable enterprise. However, if the divisions which the other participating carriers offer are presently inadequate or uncertain because they might be changed retroactively in the future, a carrier has the option of refusing to enter into the joint rate, and instead offering service on a separate rate. The shipper thus would have to pay combination rates—that is several rates to separate carriers—rather than a single joint rate to the participating carriers. Transportation on these multiple rates is almost always more expensive to shippers—both because the sum of the components is generally higher than a single rate covering the same service, and because the multiple rate system requires more administrative expense.

This would have incalculable effects upon the economy of both the South and the North, which are in no way justified by the principle stated in *Morgan* that courts should cooperate with administrative agencies to achieve statutory aims.

In fact, the *Morgan* principle leads to precisely the contrary conclusions here. In *Morgan*, the goal of effectuating the purposes of the Packers and Stockyards Act led the Court to use its equitable powers to give retroactive effect to a rate reduction that had been justified by evidence but set aside solely because of procedural defects. Here, the purpose of the Interstate Commerce Act would be frustrated by such relief. In *New York v. United States*, 331 U.S. 284 (1947), this Court made it clear that the basic statutory purpose of the Interstate Commerce Act was the removal of discrimination (331 U.S. at 296):

> "The principal evil at which the Interstate Commerce Act was aimed was discrimination in its various manifestations. Louisville & N. R. Co. v. United States, 282 U.S. 740, 749, 750."

In the context of this case, the *Morgan* principle thus plainly means that neither the Interstate Commerce Commission nor any reviewing court should countenance any form of discrimination unless and until a firm and lawful basis for such discrimination has been established.

The other cases cited by appellants are simply additional examples of the same principle. In each case, the action of the Court rested upon and was designed to implement the policy of the particular statute involved. Hence, these decisions do not provide a guide for dealing with a situation which turns upon the non-discrimination policy of the Interstate Commerce Act. Appellants cite no case, and there is none, in which discrimination has been given retroactive effect or permitted to continue to exist before a justification for that discrimination has been established under the Interstate Commerce Act.

CONCLUSION

For the foregoing reasons the petition for rehearing is without merit and should be denied.

Respectfully submitted,

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